No. 92-430

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

EL PASO NATURAL GAS COMPANY, a Delaware corporation,

Petitioner,

vs.

HARTFORD ACCIDENT AND INDEMNITY CORPORATION, a Connecticut corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

For about 15 years, standard comprehensive general liability policies issued in every state excluded coverage for damage from pollution, except where the "discharge, dispersal release or escape" of pollutants was "sudden and accidental." A rule of construction adopted in Utah and other states requires such policies to be construed against the insurer if a plausible interpretation would result in coverage.

The questions presented are:

1. Does the Erie rule require the phrase "sudden and accidental" to be interpreted without a temporal element to mean "unexpected and unintended," thereby permitting insurance coverage for losses from gradual pollution?

2. Where wastes are intentionally deposited in a containment pond or landfill, does the Erie rule require the phrase "discharge, dispersal, release or escape" to be interpreted to refer to the unintended escape of pollutants from the pond or landfill into the groundwater or surrounding soil?

LIST OF PARTIES AND RULE 29.1 LIST

The parties to proceedings before the court of appeals were petitioner El Paso Natural Gas Company and respondent Hartford Accident & Indemnity Corporation. United States Fidelity & Guaranty Company and Commercial Union Insurance Company were parties to the action before the district court but not to the appeal before the court of appeals.

Petitioner is a publicly held company and has no parent company. Petitioner has no subsidiaries that are not wholly-owned.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The Opinion of the Court of Appeals is reported at 962 F.2d 1484 (10th Cir. 1992) and appears in the Appendix at pages 1a to 18a. The court of appeals' Order Denying Petition for Rehearing, which was not reported, is included in the Appendix at pages 19a to 20a. The decision of the district court is reported at 765 F.Supp. 677 (D. Utah 1991) and appears in the Appendix at pages 20a to 28a.

JURISDICTION

The opinion and judgment of the court of appeals were entered on April 30, 1992. The order of the court of appeals denying the petition for rehearing was entered on June 9, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) (Supp. 1991).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. X:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

28 U.S.C. § 1652 (Supp. 1991):

> The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise

require or provide, shall be regarded as rules of decision in civil actions in courts of the United States, in cases where they apply.

STATEMENT OF THE CASE

A. Material Facts

Beginning in the late 1950's, members of the natural gas industry commonly used synthetic lubricants containing polychlorinated biphenyl (PCB) to lubricate air compressors at gas transmission stations. From 1959 to 1974, petitioner El Paso Natural Gas Company ("El Paso") operated a gas pipeline, known as the Northwest Division, in the states of Washington, Oregon, Idaho, Wyoming, Utah and Colorado. In 1974, El Paso transferred the Northwest Division to Northwest Pipeline Corporation ("Northwest Pipeline"). For most of the period during which it owned the Northwest Division, El Paso used PCB-carrying lubricants in its operations.

PCB is now classified by the Environmental Protection Agency ("EPA") as a hazardous substance under federal law. 40 C.F.R. § 302.4 (1990). El Paso's use of synthetic lubricants, however, ended years before PCB was considered hazardous. In 1979, the EPA implemented rules which, for the first time, prohibited certain uses of PCB under the Toxic Substances and Control Act, 15 U.S.C. §2601 et seq. (1992). The natural gas industry, including El Paso, was first led to suspect the presence of PCB in air compressor systems in 1983.

In the 1960's and early 1970's, El Paso disposed of waste synthetic lubricants primarily by channeling them from compressors and other machinery in

which they were used to one or more unlined earthen pits at each compressor site. This was the normal method by which gas transmission companies disposed of natural and synthetic lubricants. El Paso's belief, and the belief of other gas transmission companies, was that (a) the waste oil would seal the bottom of the pit and prevent seepage of light hydrocarbons into the soil; (b) overflow pipes installed near the top of the berm surrounding the containment pit would carry water away from the pits; and (c) the water that drained from the pit or seeped into the soil would not be contaminated by oil or other hydrocarbons. The pits were used as temporary disposal locations; the accumulated lubricants were periodically pumped or dredged and then carried away. At some of the sites, small quantities of lubricant were occasionally sprayed into gravel "blow down pots" with water and air from pressurized systems.

In 1987, Northwest Pipeline discovered that 15 compressor stations throughout the Northwest Division were contaminated with PCB. Most of the PCB contamination was associated with seepage from the containment pits into the soil, the groundwater, and through the overflow pipes. At several locations, investigators found physical evidence of large scale spills of contaminated water from containment pits during brief periods of high water run-off. Some of the contamination was associated with instrumentation and equipment lubricated by PCB-carrying lubricants. Some of the contamination also resulted from the use of blow down pots to reduce pressure in air systems.

Northwest Pipeline notified the Environmental Protection Agency, which concluded that PCB contamination at the compressor sites constituted an actual or threatened "release" of "hazardous substances" into the environment, within the meaning of Section 101(22) of the Comprehensive Environmental Response, Compensation

and Liability Act ("CERCLA"), 42 U.S.C. §9601(22) (1992). Northwest Pipeline thereafter entered into consent decrees with the EPA with respect to each of the compressor sites; in these decrees Northwest Pipeline was directed to clean up the PCB contamination. The EPA concluded that the potential for migration of PCB contamination threatened the "imminent endangerment" of off-site lands, the groundwater, and the environment in general.

Northwest Pipeline commenced an action against El Paso seeking damages on theories of contribution and indemnification. El Paso settled Northwest Pipeline's claims for $6.6 million and then sought recovery from its insurers under comprehensive general liability policies issued between 1959 and 1986. El Paso settled with some insurers, but respondent Hartford Accident & Indemnity Corporation (hereinafter "Hartford") denied coverage and commenced this case for declaratory relief on its policies.

From January 1, 1976 to January 1, 1986, Hartford provided comprehensive general liability and contractual liability insurance coverage for El Paso. The ten policies issued by Hartford to El Paso were identical in all material respects. Each contained a "pollution exclusion" which provided that the insurance did not cover

> bodily injury or property damage arising out of the discharge, dispersal, release or escape of . . . contaminants or pollutants into or upon the land, the atmosphere or any water course or body of water; but this exclusion, except with respect to coastal waters, does not apply if such

> discharge, dispersal, release or escape is sudden and accidental.

Hartford's comprehensive general liability policies, like the policies of other insurers, consist almost entirely of standardized terms that have been developed by the insurance industry's major trade associations. The pollution exclusion quoted above is such a standard provision. It was drafted and adopted by the insurance industry's trade associations for mandatory use in the standard form comprehensive general liability policy used throughout the nation for more than 15 years. The words "sudden and accidental" in the proviso to the exclusion were borrowed from the insurance industry's standard form boiler and machinery liability policy in which the same phrase had been used for many years. In this context, the courts had consistently interpreted the phrase "sudden and accidental" to mean "unexpected and unintended." See, e.g., Anderson & Middleton Lumber Co. v. Lumbermen's Mutual Casualty Co., 333 P.2d 938 (Wash. 1959); New England Gas & Elec. Ass'n. v. Ocean Accident & Guar. Corp., 116 N.E.2d 671, 680-81 (Mass. 1953).

In efforts to gain regulatory approval for the pollution exclusion, the insurance industry's two major trade organizations (the same organizations that drafted the pollution exclusion) represented to state authorities that the new clause was intended to eliminate acts of willful pollution from coverage. They asserted, however, that pollution from unexpected and unintended events would still be covered. In particular, they asserted, the new pollution exclusion was intended only to "clarify" existing coverage for continuous or repeated exposure to conditions resulting in injury neither expected nor intended

by the insured.[1] Consistent with these representations, Hartford's sister corporation stated in a 1987 brief to the Michigan Court of Appeals that "[t]he purpose of the [pollution] exclusion is limited; it is aimed solely at deterring intentional and willful pollution of the environment." Hartford's affiliate said that "the more reasonable and accepted view [of the exclusion's interpretation] is that the exclusion was designed to simply reinforce the fact that damages expected or intended on the part of the insured are not covered under the policy."[2]

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[1] El Paso established a detailed history of the pollution exclusion in the record before the district court. For summaries of some of the same evidence as developed in other cases, see New Castle County v. Hartford Accident & Indem. Co., 933 F.2d 1162, 1197-98 (3d Cir. 1991) (quoting statements made by the Insurance Rating Board to the Pennsylvania Commissioner of Insurance); Joy Technologies, Inc. v. Liberty Mutual Ins. Co., 1992 W.Va. LEXIS 53 (W.Va. 1992) (quoting statements made by the Insurance Rating Board and the Mutual Insurance Rating Board to the West Virginia Insurance Commission); Just v. Land Reclamation, Ltd., 456 N.W. 2d 570, 574-75 (Wis. 1990) (quoting statements made by Mutual Insurance Rating Bureau and the Insurance Rating Board to regulators in West Virginia and Georgia); Claussen v. Aetna Casualty & Sur. Co., 380 S.E. 2d 686, 689 (Ga. 1989) (quoting from Insurance Rating Board representations to the Georgia Commissioner of Insurance).

[2] Hartford's affiliate, First State Insurance Company, made these representations in a brief dated November 6, 1987, to the Michigan Court of Appeals in Upjohn Co. v. New Hampshire Ins. Co., Case No. 98969, at page 22. A copy of this brief was included in the record below and appears in the appendix to El Paso's Brief to the court of appeals beginning at page 83. The Michigan Court of Appeals agreed with First Interstate Insurance Company's arguments. See Upjohn Co. v. New Hampshire Ins. Co., 444 N.W.2d 813, 817 (Mich. App. 1989). ("[W]e believe that even a continuous discharge of chemicals may be both accidental (i.e., unintended) and sudden (i.e., unexpected) and, therefore, outside

B. Procedural Background

In September, 1988, Hartford filed this diversity suit pursuant to 28 U.S.C. §1332(a)(1) (1992) against El Paso and its other insurers. Hartford's complaint sought a declaratory order that there was no coverage under its policies with El Paso. El Paso counterclaimed for declaratory relief and payment under the policies. After the close of discovery, the parties filed cross-motions for summary judgment. The parties' motions focused on several different exclusions in the Hartford insurance policies, but the district court chose to confine its decision to the "pollution exclusion." The district court granted Hartford's motion for summary judgment and denied El Paso's motion. It held, first, that the phrase "sudden and accidental" unambiguously means "happening without notice and occurring by chance." Hartford Accident & Indem. Corp. v. United States Fidelity and Guar. Co., 765 F.Supp 677, 680 (D. Utah 1991); Appendix at 25a-27a. The court then held that this definition precluded coverage for El Paso's "continuous and routine" disposal of waste lubricants into or upon the ground. 765 F.Supp. at 680; Appendix at 25a-26a. In this connection, the court held that the "focus of the sudden and accidental exclusion clearly relates to the nature of the 'discharge, dispersal, release or escape' of the pollution itself, not to the nature of the damages caused." 765 F.Supp. at 681; Appendix at 26a.

On appeal by El Paso, the court of appeals apparently rejected the district court's interpretation of "sudden and accidental" and held that the phrase

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the pollution exclusion.") In a divided opinion, the Michigan Supreme Court reversed, see Upjohn Co. v. New Hampshire Ins. Co., 476 N.W.2d 392, 397 (Mich. 1991), holding that the word "sudden" unambiguously connotes a "temporal element that joins together conceptually the immediate and the unexpected."

unambiguously includes the requirement of abruptness. Quoting from dictum in a decision of the Utah Court of Appeals, the Tenth Circuit held that the word "sudden" connotes both a sense of "unexpectedness" and "a temporal element, specifically immediacy, abruptness, and quickness." Hartford Accident & Indem. Corp. v. United States Fidelity & Guar. Co., 962 F.2d 1484, 1490 (10th Cir. 1992), quoting Gridley Assoc. v. Transamerica Ins. Co., 828 P.2d 524, 527 (Utah App. 1992); Appendix at 12a-13a. The Tenth Circuit also held that, in the context of this case, the phrase "sudden and accidental" focuses upon El Paso's intentional deposit of wastes into waste disposal pits, and not, as El Paso argued, upon the discharge, dispersal, release and escape of contaminants from disposal pits to the environment. 962 F.2d at 1491; Appendix at 15a-17a.

During the course of its opinion, the Tenth Circuit noted that both of the issues it decided were issues of first impression in Utah. 962 F.2d at 1487; Appendix at 7a-8a. The Court of Appeals was "informed by decisions of the Utah appellate courts and by precedent of federal courts in this and other circuits." Id.

On May 14, 1992, El Paso petitioned for a rehearing. On June 9, 1992 the court of appeals denied El Paso's petition without comment.

REASONS FOR GRANTING THE WRIT

The issue in this case is one of overwhelming national concern to the natural gas industry and to businesses nationwide: whether the standard form pollution exclusion in comprehensive general liability policies should be construed to prevent insurance coverage for gradual pollution. State and federal courts now are addressing this issue in hundreds of cases. One court writing this year complained of "the litigation explosion . . .

generated by the ambiguous wording of the pollution exclusion," and noted more than a hundred recent reported decisions construing the same policy language. See Diamond Shamrock Chemicals Co. v. Aetna Casualty & Sur. Co., 609 A.2d 440, 458 (N.J. Super. 1992). The economic consequences to policy holders are significant.

In cases throughout the nation, courts are asked to construe precisely the same standard form contract language in accordance with virtually identical rules of construction. Although this case ostensibly arises under Utah law, both the court of appeals and the district court freely borrowed from decisions from the Tenth Circuit and other federal circuits throughout the country. As the court of appeals said, the narrow issues in this lawsuit are "the subject of intense national debate" involving courts at every level. 962 F.2d at 1487, Appendix at 7a. Unfortunately, no coherent rule concerning the meaning of these standardized terms is emerging.

To the contrary, there is a deep division of authority on the questions in this case, not only among the United States courts of appeals, but also among state supreme courts. The Tenth Circuit's opinion in this case conflicts with decisions of the First Circuit and the Third Circuit with respect to both issues. See, e.g., CPC International, Inc. v. Northbrook Excess & Surplus Ins. Co., 962 F.2d 77 (1st Cir. 1992), and New Castle County v. Hartford Accident & Indem. Co., 933 F.2d 1162, 1197-98 (3d Cir. 1991). The Tenth Circuit's decision also conflicts with many decisions from federal district courts and from state courts.[3] It is significant that the district court in this

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[3] See, e.g., Gilbert Spruance Co. v. Pennsylvania Mfg. Assoc. Ins. Co., 603 A.2d 61, 62 (N.J. 1992); Queen City Farms, Inc. v. Central Nat'l. Ins. Co., 827 P.2d 1024, 1050 (Wash. App. 1992); Hecla Mining Co. v. New Hampshire Ins. Co., 811 P.2d 1083, 1052

case relied upon a decision from the First Circuit which, in another case, has now ruled squarely in favor of coverage for gradual types of pollution, construing precisely the same contract language that the district court construed. See CPC International, Inc., supra, 962 F.2d at 95. It is also significant that both the district court and the court of appeals in this case concluded that the contract language was unambiguous - but each reached a *different* conclusion as to what it meant. (The district court concluded that the phrase "sudden and accidental" unambiguously means "happening without notice and occurring by chance," whereas the court of appeals concluded that the same phrase unambiguously includes the concept of abruptness.[4]) This confusion is a reflection of the disarray in which all courts find themselves concerning these critical issues.

Petitioner is mindful that "state-law determinations by the court of appeals will rarely constitute an appropriate subject of this Court's review." Haring v. Prosise, 462 U.S. 306, 314 n.8 (1983). Petitioner is also mindful that "[a]s to questions controlled by state law, . . .

(Colo. 1991); Just v. Land Reclamation, Ltd., 456 N.W.2d 570, 573 (Wis. 1990); Claussen v. Aetna Casualty & Sur. Co., 380 S.E. 686, 688-689 (Ga. 1989); United States Fidelity & Guar. Co. v. Armstrong, 479 So.2d 1164, 1167 (Ala. 1985); United States Fidelity & Guar. Co. v. Specialty Coatings, Inc., 535 N.E. 2d 1071, 1076-78 (Ill. App. 1589); Kipin Industries, Inc. v. American Universal Ins. Co., 535 N.E.2d 334, 338 (Ohio App. 1987); Jackson Township Mun. Util. Authority v. Hartford Accident & Indem. Co., 451 A.2d 990, 994 (N.J. Super. 1982).

[4]In Broderick Investment Co. v. Hartford Acc. & Indem. Co., 954 F.2d 601 (10th Cir. 1992), a different panel of the Tenth Circuit, construing Colorado law, reached a different result on this issue. On July 13, 1992, the insured in Broderick filed a petition for certiorari in this Court under Docket No. 92-92.

conflict among circuits is not of itself a reason for granting a writ of certiorari." Ruhlin v. New York Life Ins. Co., 304 U.S. 202, 206 (1938). Nevertheless, the petitioner believes that this is one of those rare cases, ostensibly controlled by state law, requiring resolution by this Court for three reasons.

First, the contract language at issue in this case, as in hundreds of other cases like it pending in courts around the country, was used for more than a decade in comprehensive general liability insurance policies in every state. The rules of construction governing these contract provisions do not vary significantly from state to state. Litigants deserve a consistent national standard on these important issues. The United States courts of appeals and district courts, however, have merely multiplied the confusion by issuing conflicting decisions. The system, in effect, forces policyholders and insurers to litigate these questions repeatedly in every forum. They should be answered once and for all by a single Court.

Second, the economic consequences of decisions on these issues are so great that they should not be left to arbitrary differences among federal or state court decisions. Neither insurance companies nor insureds should be permitted to reap windfalls by selecting a more favorable forum, when the differences among conflicting state rules are largely fortuitous.

Third, this case squarely presents the two issues of greatest concern to courts construing the pollution exclusion. Given the procedural posture of this case under Rule 56, Federal Rules of Civil Procedure, the Court must assume that El Paso neither expected nor intended the discharge of PCB from the containment ponds in which it deposited waste lubricants. These facts squarely present the issues (a) whether the pollution

exclusion permits coverage for gradual types of pollution and (b) whether the relevant "discharge" that must be measured against the "sudden and accidental" standard is the migration of pollutants from containment pits into the environment.

ARGUMENT

I. The Court of Appeals Violated Erie By Ignoring State Law Rules Favoring the Insured

The Tenth Circuit's interpretation of the pollution exclusion violated its duty to apply state law, including rules of contract construction established by state law. Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938); U.S. Const. amend X; 28 U.S.C. §1652 (1992). In this case, Erie required the court of appeals to inquire whether the pollution exclusion "may be understood to reach two or more plausible meanings and, if so, whether one of those meanings would result in coverage." Crowther v. Carter, 767 P.2d 129, 131 (Utah App. 1989) (quoting Central Sec. Mut. Ins. Co. v. Depinto, 681 P.2d 15, 17 (Kan. 1984)). Under Utah law, as under the law of other states, an insured "is entitled to the broadest protection he could have reasonably understood to be provided by the policy." Fuller v. Director of Finance, 694 P.2d 1045, 1047 (Utah 1985); see also Whitlock v. Old American Ins. Co., 442 P.2d 26, 28 (Utah 1968).

The Tenth Circuit's approach in this case, however, was not to determine whether other interpretations were ***plausible***, but whether one interpretation was ***preferable***.

Pursuing the inquiry in this way, the court of appeals violated the principle adopted in Utah and every other jurisdiction that any doubt or uncertainty about the

meaning or effect of an insurance policy must be construed against the insurer who prepared the contract. Stout v. Washington Fire & Marine Ins. Co., 385 P.2d 608, 609 (Utah 1963).

II. The Court of Appeals Violated Erie by Ignoring the Patent Ambiguity of the Pollution Exclusion

The court of appeals went out of its way to ignore the most obvious indications that the pollution exclusion is ambiguous. It insisted that the language of the pollution exclusion is not ambiguous merely because dictionaries provide more than one meaning that is plausible in context. It insisted that the pollution exclusion is not ambiguous merely because dozens of appellate decisions have held that its words have more than one reasonable meaning in context. It insisted that the language of the pollution exclusion is not ambiguous merely because insurance companies themselves have interpreted the same words in different ways. After reading the court of appeals' opinion, one wonders what could possibly render words ambiguous.

The pollution exclusion is ambiguous because it may reasonably be understood to reach two or more meanings, as demonstrated by commonly accepted definitions of the words involved, the drafting history of the exclusion, the decisions of courts construing the same language, and the precise context in which the terms are applied in this case.

A. "Sudden and accidental"

If the court of appeals had been inclined to search for other reasonable interpretations, it would have noticed the vast number of federal and state opinions

holding that the phrase "sudden and accidental" means "unexpected and unintended" in the comprehensive general liability policy. These courts have held that the pollution exclusion eliminates intentional acts of pollution, but does not eliminate unintentional pollution even where it is gradual or occurs over a long period of time. Courts reaching this conclusion have focused on three facts.

First, the word "sudden" is not invariably used to mean "quick" or "abrupt," but is used frequently to mean "unexpected" or "occurring without notice." Most dictionaries say that the word "sudden" may mean *either* "unexpected" *or* "instantaneous." In fact, "unexpected" is usually listed as the primary meaning of the word. See, e.g., Black's Law Dictionary 1432 (6th ed. 1990). Consistent with these definitions, courts construing the words "sudden and accidental" in the standard form boiler and machinery policy (from which the drafters borrowed the phrase for the pollution exclusion) uniformly held that it meant "unexpected and unintended." See New Castle County v. Hartford Accident & Indem. Co., 933 F.2d 1162, 1197-98 (3rd Cir. 1991) ("For many years [the phrase 'sudden and accidental'] had been used in the standard boiler and machinery policy and the courts uniformly had construed [it] to mean unexpected and unintended."). These usages of the word "sudden" have persuaded courts that it is ambiguous in the context of the pollution exclusion.[5]

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[5] See, e.g., New Castle County, supra, 933 F.2d at 1194 ("[T]hat the word 'sudden' is defined in a universally respected dictionary as meaning both 'happening without previous notice' and 'occurring unexpectedly' undermines [the insurer's] assertion that the word cannot be defined without a temporal component."); Hecla Mining Co., supra, 811 P.2d at 1092 (reviewing definitions of "sudden" in standard American dictionaries and concluding that the word may "reasonably be defined to mean unexpected and

Second, the history of the pollution exclusion has persuaded courts that the insurance industry did not originally intend it to eliminate coverage for accidental pollution, regardless whether it was gradual, continuous, or instantaneous. The trade associations that promoted the exclusion on behalf of Hartford and the rest of the industry represented that it would only exclude claims of intentional polluters. On the basis of this evidence, which was presented to the district court in the present case, courts have held that the insurance industry's original interpretation of the clause is at least plausible.[6]

Third, the profound disagreement among so many thoughtful courts as to the meaning of "sudden and accidental" is compelling proof of the ambiguity of the phrase. As the Wisconsin Supreme Court wrote, "Although we acknowledge that the mere controversy concerning the meaning of a contract term does not itself establish an ambiguity, this type of comprehensive debate dispels the insurers' contention that the exclusionary language is clear." Just, 456 N.W.2d at 578. In the same vein the Third Circuit wrote, "[W]e cannot help but view such a division [of

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unintended."); Just, supra, 456 N.W. 2d at 572-73 ("The very fact that recognized dictionaries differ on the primary definition of 'sudden' is evidence in and of itself that the term is ambiguous.").

[6] See, e.g., New Castle County, supra, 933 F.2d at 1198 ("[T]he evidence concerning the origin of the pollution exclusion clause, though far from conclusive, implies that the [insured's] interpretation of the clause is at least plausible, if not plainly correct."); Claussen, supra, 380 S.E.2d at 689 ("[T]he clause was intended to exclude only intentional polluters."); United States Fidelity & Guar. Co. v. Specialty Coatings, Inc., 535 N.E. 1071, 1078 (Ill. App. 1989)("[T]he policy language, and the historical background of the . . . clause [lead to the conclusion that] the ambiguities identified by defendants must be construed against the [insurer].").

authority] as at least suggesting that the term 'sudden' is susceptible of more than one reasonable definition." New Castle County, supra, 933 F.2d at 1196.

B. "Discharge, dispersal, release or escape"

The courts below held that since El Paso *intended* to dispose of waste lubricants in earthen containment pits, the "discharge, dispersal, release, or escape" of pollutants was not "accidental." The district court and the court of appeals refused to acknowledge the possibility that the phrase "discharge, dispersal, release or escape" could reasonably be interpreted to refer to the unintended escape of PCB from the disposal sites into the environment rather than El Paso's deliberate deposit of wastes into the pits. The opinions below of the courts in this case would virtually assure that insurance policies would never cover the unintended and unexpected escape of pollution from landfills, contrary to the weight of authority on the issue.[7]

In this respect, the pollution exclusion is ambiguous for three related reasons. First, it was not the placement of waste lubricants *into* the pits that caused environmental harm. If the waste had remained in the pits,

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[7] See, e.g., Aetna Casualty & Sur. Co. v. General Dynamics Corp., 783 F.Supp. 1199 (E.D.Mo. 1991), aff'd in pertinent part, 1992 WL 150933 (8th Cir. 1992); Pepper's Steel & Alloys, Inc. v. United States Fidelity & Guar. Co., 668 F.Supp. 1541, 1549 (S.D.Fla. 1787); Fireman's Fund Ins. Co. v. Ex-Cello-O Corp., 662 F.Supp. 71, 75-76 (E.D.Mich. 1987); Sylvester Brothers Dev. Co. v. Great Central Ins. Co., 480 N.W.2d 368, 373-74 (Minn.App. 1992); United States Fidelity & Guar. Co. v. Armstrong, 479 So.2d 1164, 1167 (Ala. 1985); Jackson Township Mun. Util. Authority v. Hartford Acc. & Indem. Co., 451 A.2d 990, 994 (N.J. Super. 1982).

as intended, there would have been no "pollution" and no cleanup. It was rather the escape of PCB *from* the pits *into* the groundwater and surrounding soil that caused environmental harm.

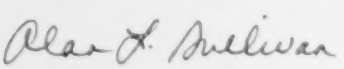
Second, the EPA did not issue remediation orders to Northwest Pipeline because lubricants were stored in containment pits, but because PCB, a CERCLA hazardous substance, had been released from the pits into the environment and threatened to do so in the future. And finally, Northwest Pipeline did not sue El Paso in the underlying action because El Paso (like Northwest Pipeline itself) stored waste in pits, but because it incurred expenses in preventing PCB releases from the pits into the environment.

In short, the "pollution" in this case was not the storage of waste lubricants in containment pits but the actual and threatened escape of PCB from the pits to surrounding soil and groundwater. As one court has said, "Application of the pollution exclusion depends exclusively upon the process by which pollutants entered the environment . . .. The decisive inquiry is not whether the policyholders anticipated property damage, or whether they regularly disposed of hazardous waste, but whether the pollutants entered the environment unexpectedly and unintentionally." Firemen's Fund Ins. Co. v. Ex-Cell-O Corp., supra, 662 F.Supp. at 75-76. At the very least, El Paso's interpretation of the phrase "discharge, dispersal, release or escape" is reasonable in the context of these facts.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,



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September 4, 1992

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

EL PASO NATURAL GAS COMPANY, a Delaware corporation,

Petitioner,

vs.

HARTFORD ACCIDENT AND INDEMNITY CORPORATION, a Connecticut corporation,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

HARTFORD ACCIDENT & INDEMNITY COMPANY, a Connecticut corporation, Plaintiff/Counter-Claim Defendant/Appellee, v. U.S. FIDELITY AND GUARANTY COMPANY, a Maryland corporation; COMMERCIAL UNION INSURANCE COMPANIES, a Massachusetts corporation, Defendants, and EL PASO NATURAL GAS COMPANY, a Delaware corporation, Defendant/Counter-Claimant/Appellant.	)	No. 91-4057
INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA; INSURANCE ENVIRONMENTAL LITIGATION ASSOCIATION; JOHN RICHARD LUDBROOKE YOUELL, Amici Curiae.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT
For the District of Utah
D.C. No. 88-C-1051J

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Thomas W. Brunner, Marilyn E. Kerst, and Sharon Rau Dissinger, of Wiley, Rein & Fielding, Washington, D.C., on the brief for Amicus Curiae Insurance Environmental Litigation Association.

David J. Richman of Coghill & Goodspeed, Denver, Colorado, on the brief for Amicus Curiae John Richard Ludbrooke Youell.

Before **MOORE** and **MCWILLIAMS**, Circuit Judges, and **HUNTER**, District Judge.*

MOORE, Circuit Judge.

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*The Honorable Elmo B. Hunter, Senior Judge for the United States District Court for the Western District of Missouri, sitting by designation.

This insurance dispute between El Paso Natural Gas Company and Hartford Accident & Indemnity Corporation involves liability for the cleanup of El Paso's gas transmission system. Hartford brought an action for declaratory relief, and subsequently Hartford and El Paso both moved for summary judgment to determine whether Hartford's comprehensive general liability insurance excluded coverage of continuous pollution. The District Court for the District of Utah found the pollution exclusion clause precluded coverage for pollution except when discharges were both sudden and accidental. Hartford Accident & Indem. Corp. v. United States Fidelity & Guar. Co., 765 F. Supp. 677 (D. Utah 1991) (Hartford v. USF&G). The court awarded summary judgment to Hartford, finding "sudden and accidental" was unambiguous and meant occurring without notice and happening by chance. Id. at 680. El Paso appeals the court's grant of summary judgment to Hartford and denial of El Paso's summary judgment motion.[1] We construe "sudden and accidental" under Utah law to mean temporally abrupt and unexpected or unintended, and affirm the district court's judgment that continuous or routine discharges of pollutants are not covered.

I. Facts

From 1959 to 1974, El Paso operated a gas transmission system traversing Washington, Oregon, Idaho, Wyoming, Utah, Colorado, and New Mexico. While operating the system, El Paso used an air compressor lubricating oil later found to have contained a polychlorinated biphenyl (PCB). El Paso dumped condensed liquid wastes containing PCBs into unlined

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[1] United States Fidelity and Guaranty Company and Commercial Union Insurance Company, the two other named defendants in Hartford's suit against El Paso, insured El Paso prior to 1976. Hartford v. USF&G, 765 F. Supp. at 679 n.4. El Paso is the only appellant.

earthen pits, and directly onto the ground. Lubricant containing PCBs was deposited in the same way. Some of the pits had overflow pipes which carried the contaminated wastes into the surrounding environment.

Hartford insured El Paso under a general liability policy from January 1, 1976 to January 1, 1986. El Paso sold the pipeline system to Northwest Pipeline Corporation in 1974, agreeing to indemnify Northwest for any liability arising from El Paso's activities prior to the transfer. In 1987, Northwest discovered the PCB contamination and reported it to the Environmental Protection Agency. Northwest cleaned the contaminated sites pursuant to consent orders with the EPA, sued El Paso, and settled for $6.6 million. El Paso then demanded indemnification from Hartford under its comprehensive general liability policy. Hartford refused and brought this declaratory judgment action against El Paso on the grounds the policy's pollution exclusion precluded coverage of contamination that was not both sudden and accidental.[2]

II. Jurisdiction and Standard of Review

We have diversity jurisdiction, 28 U.S.C. §1332(a)(1), and we apply Utah substantive law. See Erie Ry. v. Tompkins, 304 U.S. 64 (1938). We review the district court's construction of the contract as an issue of law de novo. Salve Regina College v. Russell, 111 S.Ct. 1217 (1991). See also Adams-Arapahoe Joint Sch. Dist. No. 28-J v. Continental Ins. Co., 891 F.2d 772, 774 (10th Cir. 1989). When an insurance policy is equivocal, it must be interpreted in favor of the insured. In the absence of ambiguity, however, "an unambiguous insurance contract,

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[2] Hartford also moved for summary judgment on the basis that the policy's "alienated premises" clause precluded coverage. The district court did not reach this issue, and it is not before us on appeal.

like any other contract, should be enforced as written." Young v. Fidelity Union Life Ins. Co., 597 F.2d 705, 707 (10th Cir. 1979). Whether ambiguity exists is a question of law. Crowther v. Carter, 767 P.2d 129 (Utah App. 1989). We accord insurance terms their ordinary usage and connotations, being "obliged to assume that language included therein was put there for a purpose, and to give it effect where its meaning is clear and unambiguous." Marriot v. Pacific Nat'l Life Assurance Co., 467 P.2d 981, 983 (Utah 1970).

III. The Policies

Hartford's general liability policies provided Hartford would pay "on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage to which the insurance applies, caused by an occurrence . . ." "Occurrence" was defined as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured." (emphasis added).

The policies each contained a "pollution exclusion" providing insurance would not cover:

> bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon the land, the atmosphere or any watercourse or body of water; but this exclusion, except with respect to coastal waters, does not apply if such discharge, dispersal, release or escape is sudden and accidental.

(emphasis added).

The parties agree El Paso was unaware its lubricating oil contained PCB contaminants. El Paso intentionally discharged oil and water into disposal pits; it did not expect or intend that water in or leaving the pits would contain PCBs. The parties dispute the construction of the contract, and specifically how to apply "sudden and accidental" to a "discharge, dispersal, release or escape" of pollutants.

El Paso argues (1) "sudden and accidental" is ambiguous, and ambiguities in insurance contracts are construed in favor of the insured; (2) "sudden and accidental" means "unexpected or unintended," and since it did not expect or intend PCB contaminants to migrate into the environment the damage is insured; and (3) "sudden and accidental" relates not to the initial and continuous discharges of its waste material but to the resulting unintended PCB damage. El Paso also contends the history of comprehensive general liability policies demonstrates only intentional polluters were to be excluded from coverage.

Hartford answers "sudden and accidental" (1) is unambiguous and necessarily implies temporality, and (2) relates to El Paso's routine discharges and not to the damage caused by the discharged waste. Hartford argues El Paso's intentions and knowledge of PCB contamination are immaterial, and the discharge itself must be both unexpected or unintended (accidental) and abrupt or immediate (sudden). Hartford further argues El Paso's documentation through extrinsic evidence of the intentions of the insurance industry in drafting the pollution exclusion is irrelevant because the policy is clear on its face.

A. Sudden and Accidental

Liability for continuous polluting events is the subject of intense national debate, and there is a wide range of authority to which both parties have cited. The Utah Supreme Court has not yet considered the meaning of

"sudden and accidental" in the context of the pollution exclusion. In such a case of first impression, our responsibility is to give the clause the interpretation we believe the Utah court would. We are informed by decision of the Utah appellate courts and by precedent of federal courts in this and other circuits.[3] We review the district court's interpretation of Utah law de novo. Salve Regina, 111 S.Ct. at 1221.

Most courts agree "accidental" means unexpected or unintended. In American Motorists Ins. Co. v. General Host Corp., 946 F.2d 1482 (10th Cir. 1991), construing Kansas law, we noted "[t]here is a sharp division of authority on the issue of whether pollution that occurs over an extended period of time is 'sudden' within the meaning of the pollution exclusion. . . However, we have found no similar division of authority concerning the meaning of the term 'accidental.' The courts have interpreted 'accidental' to refer to pollution which is not expected or intended by the insured. Id. at 1486.[4]

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[3] See Adams-Arapahoe School Dist., 891 F.2d at 774. ("With respect to issues which the Colorado Supreme Court has not addressed, we may consider all available resources, including Colorado appellate court decisions, other state and federal decisions, and the general trend of authority, to determine how the Colorado Supreme Court would construe the law in this case.") (citations omitted).

[4] American Motorists Ins. Co. v. General Host Corp., 946 F.2d 1482 (10th Cir. 1991), was vacated and remanded at 946 F.2d 1489. The panel on rehearing vacated that portion of the first opinion that held American Motorists had no duty to defend because the pollution was found not to be accidental. The court concluded the underlying action was "arguably and potentially" within the "sudden and accidental" exception of the insurance contract and remanded for further proceedings on the duty to defend issue. American Motorists, 946 F.2d at 1492. The first panel's description of the case law defining "accidental" in pollution exclusion clauses is still instructive.

Similarly, in EAD Metallurgical, Inc. v. Aetna Casualty & Sur. Co., 905 F.2d 8 (2d Cir. 1990), where EAD continuously deposited radioactive substances into sewer lines in a New York town, the court stated pollution damage "resulting from purposeful conduct, cannot be considered 'accidental.'" Id. at 11 (citing Powers Chemco, Inc. v. Federal Ins. Co., 74 N.Y.2d 910, 549 N.Y.S.2d 650, 548 N.E. 2d 1301 (1989)). See also Great Lakes Container Corp. v. National Union Fire Ins. Co., 727 F.2d 30, 33-34 (1st Cir. 1984) (coverage excluded where pollution and contamination of the soil, surface, and subsurface waters allegedly occurred as a concomitant of regular business activity).

El Paso argues most cases where coverage is excluded involve not only gradual or long-term pollution but also intentional polluting acts. While this is true in cases which have failed the "accidental" requirement,[5] the argument assumes we will read sudden synonymously with accidental or unintentional. El Paso no doubt believes "[t]he central inquiry should not be whether the pollution occurred over a long period of time, but whether the insured knew about it or intended it." (Brief of Defendant-Appellant El Paso Natural Gas Company at 35). The contract, however, treats "sudden" and "accidental" as coextensive requirements, which we weigh equally.

The principal authority on which El Paso relies is New Castle County v. Hartford Accident & Indem. Co., 933 F.2d 1162 (3d Cir. 1991). The New Castle County court found authority for the interpretation of "sudden and accidental" split evenly between those courts barring coverage and holding "sudden" means abrupt or brief, and those holding in favor of the insured on the grounds "sudden and accidental" is ambiguous and means unexpected or unintended. New Castle County, 933 F.2d

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[5] See, e.g., EAD Metallurgical, Inc. v. Aetna Casualty & Sur. Co., 905 F.2d at 11 (appellants alleged to have "continuously and intentionally polluted.").

at 1195 n.60, n.61. The court stated because "'sudden' . . . [is] capable of two reasonable interpretations, ('abrupt' and 'unexpected') . . . the term is ambiguous under Delaware law," and must be construed in favor of the County of New Castle. Id. at 1198-99. The court reasoned:

> Simply put, sudden means unexpected, and accidental means unintended . . . Insurance policies routinely use words that, while not strictly redundant, are somewhat synonymous . . . We think that the words "sudden" and "accidental," when read together, serve the same purpose as "discharge, dispersal, release or escape": they each connote the same general concept -- namely fortuity -- with a small variation. Neither do we think that annexing the word "sudden" to the word "accidental" with the conjunctive "and" necessarily injects a temporal element, such as brevity or abruptness, into the exception to the pollution exclusion clause.

Id. at 1194-95.

We disagree. We think the "annexation" of "sudden" to "accidental" is precisely the issue: reading "sudden" without a temporal component renders "accidental" redundant. While both conditions might include "unexpected" or "unintended," "sudden" cannot mean "gradual," "routine" or "continuous." Since Utah law dictates each contract provision be given effect, Marriot, 467 P.2d at 983, the conjunctive association of "sudden" with "accidental" is exactly the point on which our interpretation turns. Dictionaries may indicate each word has several overlapping meanings. We cannot use only the redundant definitions, however. Giving effect to every provision obliges us to construe "sudden" and "accidental" as separate, conditional requirements for coverage. This

interpretative rule thus removes any ambiguity created by common usage.

It is worth noting the New Castle County court did not claim either the split of judicial authority on this issue or the existence of numerous dictionary definitions required a finding of ambiguity.[6] The court stated "[b]y their very nature, dictionaries define words in the abstract, whereas here, we must ascertain whether the word 'sudden' is ambiguous in the context of a specific insurance policy." 933 F.2d at 1194. The court also noted conflicting precedent, while relevant, did not "automatically mandate a finding of ambiguity." Id. at 1196.

We are in accord with numerous other federal court decisions which have found "sudden and accidental" precludes coverage of damage from continuous or routine business practices. In United States Fidelity and Guar. Co. v. Star Fire Coals, Inc., 856 F.2d 31 (6th Cir. 1988), the Sixth Circuit held where Star Fire had discharged excessive amounts of coal dust in the course of its routine operations, it was not possible "to define 'sudden' without reference to a temporal element that joins together conceptually the immediate and the unexpected." Id. at 34. In Ogden Corp. v. Travelers Indem. Co., 924 F.2d 39 (2d Cir. 1991), the Second Circuit found a "sudden" release or discharge of hazardous heavy metals had to "'occur[] over a short period of time'" under New York law. Id. at 42 (citing Technicon Elecs. Corp. v. American Home Assurance Co., 141 A.D.2d 124, 137, 533 N.Y.S.2d 91, 99 (2d Dep't 1988), aff'd, 74 N.Y.2d 66, 542 N.E.2d 1048, 544

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[6] "[W]e agree . . . that the existence of more than one dictionary definition is not the sine qua non of ambiguity. If it were, few words would be unambiguous." 933 F.2d at 1193 (citing Fireman's Fund Ins. Cos. v. Ex-Cell-O Corp., 702 F. Supp. 1317, 1324 (E.D. Mich. 1988) ("[I]f merely applying a definition in the dictionary suffices to create ambiguity, no term would be unambiguous. The interpretation of contractual language is not mechanical.").

N.Y.S.2d 531 (1989)). Similarly, the First Circuit recently stated "[w]e agree . . .'[i]f the word 'sudden' is to have any meaning or value in the exception to the pollution exclusion clause, only an abrupt discharge or release of pollutants falls within the exception.'" A. Johnson & Co. v. Aetna Casualty and Sur. Co., 933 F.2d 66, 73 (1st Cir. 1991).

Since its decision in this case, the Utah district court again has construed Utah law to require "sudden" be given its common temporal meaning. Anaconda Minerals Co. v. Stoller Chem. Co., 773 F. Supp. 1498 (D. Utah 1991). In Anaconda Minerals, a manufacturing operation continuously produced open waste piles of flue dust and mineral products containing hazardous materials. Holding routine discharges of pollutants or contaminants over a lengthy period are not sudden, the court stated:

> [t]o strip "sudden" of its temporal element and define it as meaning "unexpected" as insureds suggests, would render "accidental" mere surplusage in the sudden and accidental exception. This would be contrary to Utah contract law, which requires the court to assume all language in a contract has a purpose and must be given effect. See Marriot v. Pacific Nat'l Assurance Co., 24 Utah 2d 182, 467 P.2d 981, 983 (1970).

Anaconda Minerals, 773 F.Supp. at 1505.

While the Utah Supreme Court has not yet addressed the pollution exclusion, we believe the Utah trial and appellate courts have indicated the Utah Supreme Court would accord "sudden" its temporal meaning in the context of these contracts. In Gridley Assocs., Ltd. v. Transamerica Ins. Co., ___ P.2d ___, No. 910121-CA, 1992 WL 52380 (Utah App. Mar. 18, 1992), the Utah court of Appeals held the pollution exclusion applied to a gasoline spill which occurred because of a "clean break" in the

gasoline line. Gridley, 1992 WL 52380, at *3-4. Noting it was a case of first impression in Utah, id. at *2-3, the court found "sudden" was unambiguous in the language of the pollution clause. "While the word connotes a sense of unexpectedness, 'sudden' within the 'sudden and accidental' clause cannot be defined without reference to a temporal element, specifically immediacy, abruptness, and quickness." Id. at *3.[7] We thus are persuaded the temporal element of "sudden" when joined with "accidental" is unambiguous.

B. The Damage/Discharge Distinction

El Paso also argues the policy defines its coverage on the basis of "occurrences," which are "neither expected nor intended," and includes continuous or repeated events like the discharges at issue here. That contention, however, does not speak to the language of the pollution exclusion, which says insurance shall not be provided for any "property damage arising out of the discharge, dispersal, release or escape of . . . waste materials . . . contaminants or pollutants into or upon the land," except if "such discharge . . . is sudden and accidental." (emphasis added). It is clear to us the "occurrence" and pollution exclusion provisions speak to different eventualities. While an accidental "occurrence" may be gradual, the discharge of pollution has more precise requirements for coverage.

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[7] In an unpublished opinion, the trial court for the third district of Utah came to a similar conclusion. See Anaconda Minerals, 773 F.Supp. at 1505 n.9 (citing Sharon Steel v. Aetna Casualty & Sur. Co., Nos. C-87-2306 & C-87-2311 at 28 (3d Dist. Utah, July 20, 1988)) ("without referring to dictionaries, case law or parol evidence, reasonably prudent person would interpret 'sudden' as including 'temporal condition of being instantaneous and abrupt'").

We explained the relationship of these provisions in Broderick Inv. Co. v. Hartford Accident & Indem. Co., 954 F.2d 601 (10th Cir. 1992):

> Assuming the insured's loss resulted from an occurrence, the insurer may avoid paying out on the policy if the event falls within the policy's pollution exclusion. This provision excludes coverage for damages "arising out of the discharge, dispersal, release or escape of . . . pollutants into or upon [the] land." Coverage is restored, however, if "such discharge, dispersal, release or escape is sudden and accidental."

Broderick, 954 F.2d at 605. If the loss "arises out of" the discharge of pollution, the pollution exclusion, not the more generous coverage of the "occurrence" provision, governs.[9]

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[9] See Star Fire Coals, 856 F.2d at 34:

> We have no difficulty reconciling the two provisions. We believe the "occurrence" definition results in a policy that provides coverage for continuous or repeated exposure to conditions causing damages in all cases except those involving pollution, where coverage is limited to those situations where the discharge was "sudden and accidental."

See also New Castle County, 933 F.2d at 1200:

> [The insured] misreads and confuses the policy provisions. The fact that the damage was not intended means that there was an "occurrence" within the policy definition. That fact has nothing to do with whether the discharge was "sudden and accidental" for the purpose of applying the exception to the exclusion.

As the district court noted, "[t]he occurrence definition and the pollution exclusion serve distinct purposes. No ambiguity is created merely because an exclusion eliminates coverage from an insuring agreement." Hartford v. USF&G, 765 F.Supp. at 681. See also Anaconda Minerals, 773 F.Supp. at 1503 n.7 ("'Occurrences' are covered unless the occurrences arise out of polluting events; those are not covered unless the polluting events are sudden and accidental . . ." (citing American Motorists Ins. Co. v. General Host Corp., 667 F.Supp. 1423, 1429 (D. Kan. 1987), aff'd, 946 F.2d 1482 (10th Cir. 1991), vacated in part and remanded, 946 F.2d 1489 (10th Cir. 1991)).

Utah law holds "'arising out of' is a phrase of much broader significance than 'caused by.'" National Farmers Union Property & Casualty Co. v. Western Casualty & Sur. Co., 577 P.2d 961, 963 (Utah 1978). In an insurance policy the phrase means "originating from, growing out of, or flowing from, and require[s] only that there be some causal relationship between the injury and the risk for which coverage is provided." Id. The causal connection in this case between El Paso's continuous discharges of waste and PCB contamination is undisputed. Though unwitting, PCB contamination was inherent in every discharge.

We have found almost universal agreement among federal courts applying the pollution exclusion that it is the discharge which must be sudden and accidental to qualify for coverage, not the pollution damage. In Broderick, we reversed the district court for Colorado which held "discharge, dispersal, release or escape" applied only to the seepage of wood treatment chemicals from the holding pond into the groundwater, not to the initial deposit of waste chemicals into the ponds. Broderick, 954 F.2d at

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Citing Transamerica Ins. Co. v. Sunnes, 77 Or. App. 136, 140, 711 P.2d 212, 214 (1985), review denied, 301 Or. 76, 717 P.2d 631 (1986) (emphasis in original).

607. We reasoned "because the pollution exclusion clause utilizes the word 'or' to connect these four words, the exclusion is triggered if even one of the four words unambiguously describes BIC's placement of waste into the ponds." Id. We concluded "discharge into or upon the land" described Broderick's placement of waste into the disposal ponds. In our opinion, El Paso's arguments concerning the unintended damage from its discharges parallel those we dismissed in Broderick. Whether El Paso intended to cause damage after the initial discharge is irrelevant. Id. at 608.

We note Broderick construed "sudden and accidental" in favor of the insured to mean unexpected and unintended, following the decision of the Colorado Supreme Court in Hecla Mining Co. v. New Hampshire Ins. Co., 811 P.2d 1083, 1092 (Colo. 1991). Broderick, 954 F.2d at 608. Even with Colorado's generous definition of "sudden and accidental," however, the Broderick court denied coverage because the initial wood treatment discharges into containment ponds were not unexpected and unintended. Id. New Castle County, a case on which El Paso relies for its definition of "sudden and accidental," withheld coverage for the same reason: "whatever the meaning of 'sudden,' the plain language of the 'sudden and accidental' exception to the pollution exclusion focuses on the nature of the discharge, not on the resulting environmental damage." 933 F.2d at 1202.

As in the construction of "sudden and accidental," we believe the Utah Supreme Court would support our conclusion the pollution exclusion restores coverage only for polluting discharges which are sudden and accidental. The federal district court for Utah has construed Utah law twice to exclude damage from the focus of the pollution exclusion. In Anaconda Minerals the court stated "under the pollution exclusion clause, the court need only inquire whether the insured intended the discharge of the pollutants . . . The court need not consider whether the insured intended or expected the

pollution damage caused by the discharge." Anaconda Minerals, 773 F.Supp. at 1506.

Treating the issue on first impression, the Utah Court of Appeals held in Gridley "the explicit language of Gridley's policy only requires that the discharge itself be 'sudden' in order to be covered under the policy." 1992 WL 52380, at *4. In El Paso's case, the disposal of liquid wastes into the pits was neither abrupt nor unexpected but a continuous and routine operating practice over many years. The PCB contamination which was concomitant with this discharge was unintended and unexpected but not sudden. Even were we to apply the pollution exclusion to the damage, in contradiction to our interpretation of Utah and general contract law, the PCB damage was not abrupt or quick, only unintentional.

IV. Summary

We agree with Hartford. Because we think "sudden" includes a temporal element, and is joined conjunctively with "accidental," El Paso's intentions or ignorance of the PCBs are not sufficient to satisfy the pollution exclusion. The more relevant fact is El Paso's regular and continuous business practice of discharging waste products directly into the environment. While the meaning of "sudden and accidental" may include the unexpected, it plainly cannot comprehend unexpected, unintended and gradual. Because we think the contract is unambiguous, we do not reach El Paso's arguments concerning the drafting history of the pollution exclusion.

We hold "sudden and accidental" in the pollution exclusion means abrupt or quick and unexpected or unintended in the context of Utah law. We conclude the pollution exclusion restores coverage to those polluting occurrences in which the discharge of the contaminant is both sudden and accidental. We thus **AFFIRM** the holding of the district court.

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

HARTFORD ACCIDENT & INDEMNITY COMPANY, a Connecticut corporation,	)	
Plaintiff/Counter-Claim Defendant/Appellee,	)	
v.	)	
EL PASO NATURAL GAS COMPANY, a Delaware corporation,	)	No. 91-4057
Defendant/Counter-Claimant/Appellant.	)	

ORDER
Entered June 9, 1992

Before, **MCKAY**, Chief Judge, **LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, MCWILLIAMS,** Circuit Judges, and **HUNTER***, District Judge.

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* The Honorable **ELMO B. HUNTER,** Senior District Judge for the United States District Court for the Western District of Missouri, sitting by designation.

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing en banc in the captioned case.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision sought to be reheard.

In accordance with Rule 35(b) of the Federal Rules of Appellate Procedure, the suggestion for rehearing en banc was transmitted to all the judges of the court in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court
ROBERT L. HOECKER, Clerk

By: Patrick Fisher
Chief Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

HARTFORD ACCIDENT & INDEMNITY COMPANY, a Connecticut corporation, Plaintiff, v. UNITED STATES FIDELITY AND GUARANTY COMPANY, a Maryland corporation; EL PASO NATURAL GAS, a Delaware corporation; COMMERCIAL UNION INSURANCE COMPANY, a Massachusetts corporation, Defendants.	)	MEMORANDUM OPINION AND ORDER Civil No. 88-C-1051J

I. INTRODUCTION

On December 20, 1989, the court heard argument on two pending motions. The motions included: a Motion for Summary Judgment brought by plaintiff Hartford Accident and Indemnity Corporation ("Hartford") with respect to the "alienated premises exclusion" contained in an insurance policy (the "Liability Policy") issued by Hartford to defendant El Paso Natural Gas ("El Paso"); and a Motion to Compel brought by El Paso. The court took the Motions under advisement.

On September 19, 1990, and October 10, 1990, the court heard argument on cross Motions for Summary Judgment filed by Hartford and El Paso with respect to the "pollution exclusion" of the Liability Policy. The court also heard argument on two Motions for Summary Judgment brought by defendants United States Fidelity and Guarantee Company ("USFG") and Commercial Union Insurance Company ("Commercial"). USFG and Commercial claim that no controversy exists between Hartford and USFG, or Hartford and Commercial. The court took all Motions under advisement.

Having carefully considered the memoranda and arguments of counsel, and for the reasons set forth below, the court hereby issues its rulings:

1. Hartford's Motion for Summary Judgment with respect to the pollution exclusion in GRANTED; and

2. El Paso's Motion for Summary Judgment with respect to the pollution exclusion is DENIED.

Having based its ruling on the pollution exclusion, the court finds that it need not reach the questions presented by the parties' other pending motions.

II. FACTS

Northwest Pipeline Corporation ("Northwest") owns and operates a natural gas transmission system which traverses the states of Washington, Oregon, Idaho, Wyoming, Utah, Colorado and New Mexico (the "System"). The System, which was constructed and placed in operation during the mid-1950's was acquired by El Paso in 1959. In 1974, El Paso sold the System to Northwest. El Paso agreed in the terms of the sale to indemnify Northwest for any liability or expenses arising from El Paso's activities prior to transferring the System.

During the 15 years El Paso owned the System, the company used an air compressor lubricating oil, Pydraul AC, at 15 of the System's compressor sites. Pydraul AC contains the toxic substance aroclor 1254, a polychlorinated biphenyl ("PCB").[1] El Paso disposed of the used PCBs by routinely draining the contaminants directly into the ground, or periodically draining them into concrete sumps, which were later pumped out into dirt pits. Some pits contained pipes designed to discharge any waste overflow directly into the surrounding ground.[2]

In 1987, Northwest discovered the PCB contamination. Northwest reported the contamination to several government agencies, including the Environmental Protection Agency (the "EPA"). Pursuant to consent orders entered into with the EPA, Northwest cleaned up the contaminated equipment, drains, sumps, pits and surrounding ground.[3]

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[1] Beginning in the late 1950's members of the natural gas industry commonly used synthetic lubricants containing PCBs to lubricate air compressors. The principle advantage of such lubricants was that they were fire resistant. Manufacturers ceased to make Pydraul AC in 1972. Using up inventories on hand, El Paso continued to use Pydraul AC until 1974.

[2] El Paso claims that their methods of disposing of waste lubricants into dirt pits was in conformity with industry standards. El Paso believed that (i) the waste oil would seal the bottom of the pit and prevent seepage of other hydrocarbons; (ii) overflow pipes would carry uncontaminated water away from the pits; and (iii) water that was drained out of the pit or which seeped into the ground at the bottom of the pit would be uncontaminated with hydrocarbons.

[3] The EPA found that the PCB contamination presented an imminent and substantial endangerment to the public health, or welfare of the environment. Accordingly, the EPA concluded that its clean-up orders were necessary to avoid such danger.

Relying on the sales agreement indemnification provision between Northwest and El Paso, Northwest filed a lawsuit against El Paso to recover the contamination clean up costs. El Paso agreed to pay Northwest $6.6 million dollars to settle that action. In turn, El Paso sought indemnification from Hartford, its insurance carrier, for the $6.6 million dollar settlement.[4]

On October 6, 1989, Hartford denied coverage of El Paso's claims. Hartford then instigated this action seeking a declaratory judgment that the Liability Policy excluded coverage of the PCB contamination. The narrow issue before the court, as presented in the parties' cross Motions for Summary Judgment, is whether the Liability Policy's pollution exclusion excludes coverage of such contamination.

III. DISCUSSION

The construction of an insurance contract is a matter of law that the court can resolve in the context of a motion for summary judgment. Adams-Arapahoe Joint School District v. Continental Ins. Co., 891 F.2d 772, 774 (10th Cir. 1989). Contract construction remains a question of law even though the parties may disagree about the meaning of the contract, or even though one party may claim that the contract is ambiguous. Gomez v. American Electrical Power Service Corp., 726 F.2d 649, 651-52 (10th Cir. 1984).

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[4] From January 1, 1976, to January 1, 1986, Hartford insured El Paso under a general liability policy. Over the years, Hartford issued a total of ten liability policies to El Paso. Each of the policies was identical in all material respects.

USFG and Commercial, the two other named defendants in this case, insured El Paso prior to 1976.

The issue before the court concerns the meaning of the pollution exclusion set forth in the Liability Policy issued by Hartford to its insured, El Paso. The exclusion provides in pertinent part:

> This insurance does not apply:
>
> . . .
>
> (f) To bodily injury or property damage arising out of the discharge, dispersal, release or escape of . . . toxic chemicals . . . waste materials or other . . . pollutants into or upon land, the atmosphere or any watercourse or body of water; but this exclusion
> . . . does not apply if such discharge, dispersal, release or escape is sudden and accidental . . .

(Emphasis in original).

The exclusion expressly states that unless the discharge of toxic chemicals is sudden and accidental, there is no coverage under the policy. The parties disagree as to the meaning of the phrase sudden and accidental. The parties also disagree as to whether the phrase concerns the nature of the discharge, or the nature of the damages caused by the discharge.

El Paso argues that the sudden and accidental language excludes coverage only if the damage caused by the contamination was unexpected and unintended from the standpoint of the insured. El Paso claims that the history of the insurance industry shows a clear intent to provide coverage, even from gradual pollution damages, if the damage was not intentionally caused by the policy holder. In the alternative, El Paso argues that the pollution exclusion is ambiguous, and therefore should be construed against the drafter, Hartford, and in favor of El Paso.

In contrast, it is Hartford's position that the court should look at the plain meaning of the terms sudden and accidental. Hartford claims that the phrase sudden and accidental excludes coverage if the discharge of the pollutants occurred without notice and such discharge was by chance. Accordingly, Hartford argues that El Paso's regular and repeated discharge of waste chemicals over a period of several years was not sudden and accidental because they did not occur without notice and by chance.

A. The Phrase Sudden and Accidental Means Happening Without Notice and Occurring by Chance

The courts are divided as to the proper interpretation of the terms sudden and accidental in the context of liability insurance. Some courts interpret the phrase to mean "unexpected and unintended." See, e.g., Anderson & Middleton Lumber Co. v. Lumbermen's Mutual Casualty Co., 53 Wash. 2d 404, 333 P.2d 938 (1959); New England Gas & Electric Ass'n v. Ocean Accident & Guarantee Corp., 330 Mass. 640, 116 N.E.2d 671, 680-81 (1953). Other courts find that the terms sudden and accidental mean "happening without notice and occurring by chance." See, e.g., U.S. Fidelity & Guaranty v. Star Fire Coals, Inc., 856 F.2d 31 (6th Cir. 1988); Great Lakes Container Corp. v. National Union Fire Ins. Co., 727 F.2d 30 (1st Cir. 1984). This court finds that the more well reasoned case law gives the phrase sudden and accidental its plain and simple meaning. Accordingly, the court is persuaded to adopt the current line of decisions which exclude coverage unless the contamination occurs without notice and such events happen by chance.

The courts adopting the plain and simple definition of sudden and accidental have uniformly found the regular and repeated discharge of waste to be excluded from coverage by the pollution exclusion. For example, in Great Lakes Container, the insured was alleged to have routinely discharged waste chemicals onto the site of its barrel-

reconditioning facility as an aspect of its business operations. The court held that the insured's clean up cost recovery claim against its carrier fell "squarely" within the exclusion, and that no coverage existed. 727 F.2d at 33-34. Similarly, in U.S. Fidelity, the court found that coal dust waste generated by the normal operation of the insured, which was discharged on a routine, continuing basis, was excluded from coverage. 856 F.2d 31 at 32. In both Great Lakes and U.S. Fidelity, the court found that such routine and repeated discharges were not sudden and accidental.

Likewise, this court finds that El Paso's continuous and routine discharge of pollutants upon or into the ground cannot be construed as sudden and accidental. It is undisputed that the alleged property damage arose from El Paso's discharge of toxic chemicals onto its land. If the used PCBs were not dumped directly into the ground, the waste was discharged into dirt pits. Such discharges were the result of the continuous and deliberate business practices engaged in by El Paso for 15 years.

Further, the court emphasizes that the focus of the sudden and accidental exclusion clearly relates to the nature of the "discharge, dispersal, release or escape" of the pollution itself, not to the nature of the damages caused. El Paso's claim that the damages were sudden and accidental mischaracterizes the relevant question before the court. The focus of the pollution exclusion, by its plain terms, is on the polluting discharges. If the discharge is not sudden and accidental, the exclusion is applicable and the resultant injury or damage is not within policy coverage. Accordingly, the contamination that resulted from El Paso's continuous dumping of toxic chemicals is not sudden, even if one could argue that the seepage was accidental or the resulting damage unexpected. See Fischer & Porter Co. v. Liberty Mutual Ins. Co., 656 F. Supp. 132, 140 (E.D. Pa. 1986).

B. The Phrase Sudden and Accidental is Unambiguous

The court rejects El Paso's alternative contention that the pollution exclusion is ambiguous. The court finds that the words sudden and accidental have plain, discrete and readily ascertainable meanings. Such language cannot give rise to any reasonable expectation of coverage for claims arising from repeated and continuous polluting events. A casual reading of the policy as a whole by the ordinary insured should negate any expectation of coverage with respect to such claims. Great Lakes, 727 F.2d at 34. As persuasively noted by the Sixth Circuit, the sudden and accidental "language is clear and plan, something only a lawyer's ingenuity could make ambiguous . . . It's strange logic to perceive ambiguity in this clause." U.S. Fidelity, 856 F.2d at 34 (citations omitted).

The court also rejects El Paso's argument that a reading of the "occurrence" definition of the Liability Policy renders the pollution exclusion ambiguous. Under the terms of the policy, Hartford must indemnify El Paso if the property damages is caused by an occurrence, such as repeated exposure to conditions which results in property damage, that is not intended by the insured. The court finds that El Paso's theory evidences a basic misunderstanding of the construction and operation of insurance contracts. The occurrence definition and the pollution exclusion serve distinct purposes. No ambiguity is created merely because an exclusion eliminates coverage from an insuring agreement. See Occidental Fire and Casualty Co. v. Lumbermen's Mutual Casualty Co., 667 F. Supp. 679, 683 (N.D. Cal. 1987). Policies are generally written to first define the scope of the agreement, and then to exclude the specific risks which the insurer does not cover. Id. See also Crawford v. Ranger Ins. Co., 653 F.2d 1248, 1250-51 (9th Cir. 1981) (insuring agreement's preconditions to coverage may be narrowed by other policy terms).

The broad sweep of the occurrence definition is restricted by the pollution exclusion. Specifically, the exclusion provides that the policy does not apply to injuries or damage arising from the discharge or release of pollutants. Accordingly, the exclusion relieves Hartford of any obligation to provide coverage in cases where the damage is caused by the continuous and repeated discharge of PCBs. The Liability Policy should not be viewed as ambiguous merely because the pollution exclusion excludes coverage for certain risks that the occurrence definition potentially includes.

IV. CONCLUSION

Any property damage arising from El Paso's routine and deliberate discharges upon the land is excluded by the terms of Hartford's policy. Because there is no ambiguity in the language of the exclusion the exclusion should be enforced according to its plain terms. Accordingly, as a matter of law, the recurrent nature of the discharges do not render them sudden and accidental. Hartford's Motion for Summary Judgment must therefore be granted.

IT IS SO ORDERED.

Dated this 28th day of February, 1991

BY THE COURT:

Bruce S. Jenkins, Chief Judge
United States District Court